

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-07-SE-023
)	NAL/Acct. No. 200732100036
Syntax-Brilliant Corporation)	FRN # 0016507311
)	

**FORFEITURE ORDER AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: April 9, 2008

Released: April 10, 2008

By the Commission:

I. INTRODUCTION

1. In this *Forfeiture Order and Notice of Apparent Liability for Forfeiture*, we issue a monetary forfeiture in the amount of one million, two hundred sixty six thousand, one hundred dollars (\$1,266,100) against Syntax-Brilliant Corporation (“Syntax-Brilliant”) for its willful and repeated violations of Sections 15.117(i)(1)(i) and (ii) of the Commission’s rules (“Rules”).¹ These violations involve Syntax-Brilliant’s importation and interstate shipment of television receivers that do not comply with the Commission’s rules regarding digital television (“DTV”) reception capability. In addition, we propose a forfeiture in the amount of eleven thousand dollars (\$11,000) against Syntax-Brilliant for providing to the Commission, during the course of staff’s investigation of its violations of the DTV tuner requirement, material factual information that is incorrect without a reasonable basis for believing the material factual information was correct, in willful violation of Section 1.17(a)(2) of the Rules.²

II. BACKGROUND

2. The Commission adopted the DTV reception capability requirement in 2002.³ That requirement, which also is often termed the “DTV tuner requirement,”⁴ requires that all new television broadcast receivers that are imported into the United States or shipped in interstate commerce be capable of receiving the signals of DTV broadcast stations over-the-air.⁵ The DTV tuner requirement was intended to facilitate the transition to digital television by promoting the availability of DTV reception equipment and to protect consumers by ensuring that their television receivers will provide off-the-air

¹ 47 C.F.R. §§ 15.117(i)(1)(i) and 15.117(i)(1)(ii).

² 47 C.F.R. § 1.17(a)(2).

³ *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978, 15996 ¶ 40 (2002) (“*DTV Review Second Report and Order*”).

⁴ DTV reception capability involves more circuitry than just a tuner. To provide this capability requires a tuner to receive the digital signal, an MPEG decoder/formatter, and associated processing capability and memory. See *Requirements for Digital Television Receiving Capability*, Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11196, 11196 ¶ 1 n. 2 (2005) (“*DTV Tuner Report and Order*”).

⁵ *DTV Review Second Report and Order*, 17 FCC Rcd at 15996 ¶ 40. The DTV tuner requirement also applies to other devices such as television interface devices that do not include a viewing screen, e.g., devices such as VCRs and DVD players that are intended to provide audio-video signals to a video monitor and that have an antenna or antenna terminals that can be used for off-the-air television reception. See 47 C.F.R. § 15.117(i)(1)(i).

television reception of digital signals just as they have provided off-the-air television reception of analog signals.⁶

3. In order to minimize the impact of the DTV tuner requirement on both manufacturers and consumers, the Commission adopted a phase-in schedule that applied the requirement first to receivers with the largest screens and then to progressively smaller screen receivers and other television receiving devices without a viewing screen, *i.e.*, VCRs and DVD players.⁷ This phase-in plan was intended to allow increasing economies of scale with production volume to be realized so that DTV tuner costs would be lower when they were required to be included in smaller sets and other television receiving devices.⁸ As modified by the Commission in 2005,⁹ this phase-in schedule was as follows:

Receivers with screen sizes 36” and above -- 50% of units imported or shipped interstate by responsible parties¹⁰ were required to include DTV tuners effective July 1, 2004; 100% of such units were required to include DTV tuners effective July 1, 2005;

Receivers with screen sizes 25” to 35” -- 50% of units imported or shipped interstate by responsible parties were required to include DTV tuners effective July 1, 2005; 100% of such units were required to include DTV tuners effective March 1, 2006;

Receivers with screen sizes less than 25” -- 100% of units imported or shipped interstate by responsible parties were required to include DTV tuners effective March 1, 2007; and

Other video devices (videocassette recorders (VCRs), digital video recorders such as hard drive and DVD recorders, etc.) that receive television signals -- 100% of units imported or shipped interstate by responsible parties were required to include DTV tuners effective March 1, 2007.

⁶ *Id.* at 15979. In this latter regard, the DTV tuner requirement ensures that the intent of the All Channel Receiver Act of 1962 (“ACRA”), P.L. No. 87-529, 76 Stat. 150, is fulfilled. The ACRA, which is codified at 47 U.S.C. § 303(s), states that the Commission shall “[h]ave authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting.” See *DTV Review Second Report and Order*, 17 FCC Rcd at 15589 ¶ 24 n. 44.

⁷ *Id.* at 15996 ¶ 40.

⁸ *Id.* at 15996-97 ¶ 41.

⁹ In June 2005, the Commission modified the rules to advance the date on which 100% of new television receivers with screen sizes 25-36” that are imported or shipped interstate must include DTV tuners from July 1, 2006 to March 1, 2006. *DTV Tuner Report and Order*, 20 FCC Rcd at 11203 ¶ 16. Subsequently, in November 2005, the Commission modified the rules to advance the date on which 100% of new television receivers with screen sizes 13-24” and certain other television receiving devices such as VCRs and digital video recorders that are imported or shipped interstate must include DTV tuners from July 1, 2007 to March 1, 2007. See *Requirements for Digital Television Receiving Capability*, Second Report and Order, 20 FCC Rcd 18607, 18614 ¶ 19 (2005) (“*DTV Tuner Second Report and Order*”). The Commission also amended the rules to apply the DTV tuner requirement to new receivers with screen sizes smaller than 13” on this same schedule. *Id.* at 18616 ¶ 25.

¹⁰ The DTV tuner requirement applies to “responsible parties,” as defined in Section 2.909 of the Rules. 47 C.F.R. § 2.909. Under Section 2.909, the party responsible for equipment such as television receivers that is subject to our “verification” equipment authorization procedure is the manufacturer or, in the case of imported equipment, the importer. If subsequent to manufacture and importation, the equipment is modified by any party not working under the authority of the responsible party, the party performing the modification becomes the new responsible party.

4. In January 2007, the Enforcement Bureau's review of Customs importation data¹¹ indicated that Syntax-Brilliant apparently was importing television receivers with screen sizes 25" to 35" ("mid-size receivers") that did not include DTV tuners after the applicable March 1, 2006 deadline. The Enforcement Bureau issued a letter of inquiry ("LOI") to Syntax-Brilliant on March 8, 2007.¹² On March 19, 2007, Syntax-Brilliant filed a response to the LOI.¹³

5. On May 30, 2007, the Commission issued a *Notice of Apparent Liability for Forfeiture* ("NAL") proposing a forfeiture against Syntax-Brilliant for its apparent willful and repeated violations of the DTV tuner requirements.¹⁴ Specifically, based on the company's LOI Response, the NAL found that after the July 1, 2005 deadline for large-size television receivers, Syntax-Brilliant made eight interstate shipments of a total of 165 non-DTV compliant large-size screen receivers. In addition, the NAL found that after the March 1, 2006 deadline for mid-size screen receivers, it imported on 88 dates a total of 28,430 non-DTV-compliant mid-size receivers and made 1,765 interstate shipments of a total of 43,892 non-DTV-compliant mid-size screen receivers. In total, the NAL found that Syntax-Brilliant imported and shipped interstate a total of 72,622 non-DTV-compliant television receivers on 1,861 occasions. The NAL further concluded that violations of the DTV tuner requirement would be subject to forfeitures on a per-unit, rather than a per model, basis because the important public policy goal of facilitating the transition to digital television rendered violations of the DTV tuner requirement more egregious than violations of other equipment marketing rules. Using a per-unit formula, the NAL therefore proposed a forfeiture of \$2,899,575 against Syntax-Brilliant for its DTV tuner violations.

6. In its response to the NAL,¹⁵ Syntax Brilliant acknowledges that it imported and shipped interstate both large-size and mid-size receivers that did not comply with the DTV tuner requirement. Syntax-Brilliant maintains, however, that the Commission erred in issuing the NAL without first issuing a citation; that it did not violate the DTV tuner requirement because it followed the Commission's "policy" of labeling its non-DTV-compliant receivers as "HD-ready"¹⁶; that the NAL and the per-unit forfeiture methodology violate the Administrative Procedure Act ("APA") and Syntax-Brilliant's due process rights; that the forfeiture amount is excessive, violates the Eighth Amendment to the Constitution, and is inconsistent with Commission precedent; and that the Commission "breached" an agreement between the FCC and Syntax-Brilliant to toll the statute of limitations for forfeiture actions.¹⁷ Further, Syntax-Brilliant

¹¹ No radio frequency device may be imported into the Customs territory of the United States unless the importer or ultimate consignee declares that the device meets one of the conditions for entry specified in Section 2.1204 of the Rules, 47 C.F.R. § 2.1204. See 47 C.F.R. § 2.1203. Such import declarations are filed with the U.S. Customs and Border Patrol on FCC Form 740, or electronically where electronic filing is available. 47 C.F.R. § 2.1205. The Enforcement Bureau, in turn, receives this importation data from Customs and uses it to monitor compliance with the DTV tuner requirements and other requirements applicable to radio frequency devices.

¹² See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau to Vincent F. Sollitto, Jr., Chairman and CEO, Syntax-Brilliant U.S.A., Inc. (March 8, 2007) ("LOI").

¹³ See Letter from Andrew M. Beato, Esq. Counsel for Syntax-Brilliant U.S.A., Inc. to Kathryn Berthot, Spectrum Enforcement Division, Enforcement Bureau (March 19, 2007) ("LOI Response").

¹⁴ See *Syntax-Brilliant Corporation*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 10530 (2007) ("NAL").

¹⁵ See Reply in Opposition to Notice of Apparent Liability for Forfeiture (October 31, 2007) ("NAL Response").

¹⁶ "HDTV-ready" or "HD-ready" generally refers to television monitors or receivers that can display HDTV programming when attached to a separate HDTV tuner, HD cable set-top box or HD satellite set-top-box receiver.

¹⁷ Syntax-Brilliant also asserts that the DTV tuner requirement is beyond the scope of the Commission's authority. NAL Response at 7, n. 3. Since Syntax-Brilliant makes no argument on this point beyond this assertion, we will not address this issue further.

asserts that the forfeiture should be substantially reduced because of disclosures it made and actions it took after it received the LOI, its history of compliance with the Commission's rules, the lack of harm to the public, and the lack of any allegation of misrepresentation on the part of Syntax-Brilliant.

III. FORFEITURE ORDER

7. The proposed forfeiture set forth in the *NAL* was assessed in accordance with Section 503(b) of the Act¹⁸ and Section 1.80 of the Rules,¹⁹ and the guidelines enunciated in the Commission's *Forfeiture Policy Statement*.²⁰ In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.²¹ We have considered Syntax-Brilliant's claims in light of the above statutory factors, and have determined that, with the exception of a reduction based on the number of receivers mistakenly described as being shipped interstate by Syntax-Brilliant in its LOI Response and the number of receivers imported by Syntax-Brilliant, there is no basis for reduction of the proposed forfeiture.

A. The Commission Was Not Required to Issue a Citation to Syntax-Brilliant Prior to Issuing the *NAL*.

8. We reject Syntax-Brilliant's assertion that the *NAL* is unenforceable because the Commission did not first issue it a citation in accordance with Section 503(b)(5) of the Act.²² Section 503(b)(5) provides that

No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, ... unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation.²³

According to Syntax-Brilliant, a citation was required in this case because it "does not hold a license, permit, certificate, or other authorization issued by the Commission."²⁴ We disagree. Under Part 15 of the Rules, television broadcast receivers are unintentional radiators and are required to be authorized under the verification procedure prior to the initiation of marketing.²⁵ Verification is a form of equipment authorization "where the manufacturer makes measurements or takes the necessary steps to insure that the

¹⁸ 47 U.S.C. § 503(b).

¹⁹ 47 C.F.R. § 1.80.

²⁰ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

²¹ 47 U.S.C. § 503(b)(2)(E).

²² *NAL Response* at 25.

²³ *See* 47 U.S.C. § 503(b)(5); *see also* 47 C.F.R. 1.80(d).

²⁴ *NAL Response* at 25.

²⁵ 47 C.F.R. § 15.101(a).

equipment complies with the appropriate technical standards.”²⁶ Pursuant to Section 2.909(b) of the Rules, the party responsible for ensuring compliance of equipment with the applicable standards is “[i]n the case of equipment subject to authorization under the verification procedure, the manufacturer or, in the case of imported equipment, the importer.”²⁷ Thus, as the manufacturer and importer of the television receivers in question, Syntax-Brilliant was the party responsible for authorizing the television receivers under the verification procedure. Therefore, we conclude that Syntax-Brilliant holds a Commission authorization for purposes of Section 503(b)(5).

9. In addition, we reject Syntax-Brilliant’s implication that verification is not an “authorization” within the meaning of Section 503(b)(5). The verification procedures are set forth in Subpart J of the Part 2 Rules, entitled “Equipment Authorization Procedures,”²⁸ and verification is described in the rules as an “equipment authorization.”²⁹ Among other things, the rules governing equipment subject to authorization under the verification procedures specify detailed technical requirements and measurement procedures,³⁰ set forth limitations on the verification,³¹ require the responsible party to maintain detailed records on the equipment and provide copies of those records to the Commission upon request,³² require the responsible party to provide samples of the equipment to the Commission upon request for testing,³³ and prescribe identification, labeling, and user manual requirements.³⁴ Absent compliance with the comprehensive technical and administrative requirements set forth in the rules, equipment subject to verification is considered to be “unauthorized” and may not be marketed in the United States.³⁵

10. Moreover, we note that there is no doubt that Congress intended to subject television equipment manufacturers to full and immediate forfeiture liability by virtue of the 1978 amendments. Congress enacted the citation procedure in Section 503(b)(5) in 1978 in conjunction with certain other amendments to the forfeiture provisions of Section 503.³⁶ One of the 1978 amendments extended the forfeiture provisions of Section 503(b) to cover any person subject to any provision of the Act or the Rules.³⁷ The legislative history of the 1978 amendments makes clear that Congress intended to include communications equipment manufacturers within the Commission’s forfeiture authority.³⁸ Further, at the time of the 1978 amendments, television receivers were subject to authorization under the certification

²⁶ 47 C.F.R. § 2.902.

²⁷ 47 C.F.R. § 2.909(b).

²⁸ See 47 C.F.R. §§ 2.901-2.1093.

²⁹ See, e.g., 47 C.F.R. § 15.101(a).

³⁰ See generally 47 C.F.R. §§ 15.101-15.123.

³¹ See 47 C.F.R. § 2.952.

³² See 47 C.F.R. § 2.955.

³³ See 47 C.F.R. § 2.956.

³⁴ See 47 C.F.R. §§ 2.954, 15.19 and 15.21.

³⁵ 47 C.F.R. § 15.101(a); see also *Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 1820, 1825 ¶ 15 (2006), *forfeiture ordered*, 22 FCC Rcd 10451 (2007) (“*Behringer*”) (forfeiture paid).

³⁶ See Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978).

³⁷ S. REP. NO. 95-580, at 1 (1977).

³⁸ *Id.* at 2, 6.

procedure, which is a written authorization issued by the Commission upon application to the Commission.³⁹

11. Additionally, the legislative history of Section 503(b)(5) indicates that the citation requirement is intended as a

special procedural protection ... for those persons who will be made subject to forfeiture liability for the first time and who are presumed to be unaware of Commission regulations This special citation procedure and interview requirement protects persons who would otherwise be subject to immediate forfeiture for willful violations such as altering electronic devices which emit electromagnetic radiation (such as garage door openers or electronic water heaters or electronic ovens) in violation of FCC rules.⁴⁰

In light of Congress' clear intention to extend the Commission's forfeiture authority to equipment manufacturers, Congress cannot reasonably be understood to have intended to include equipment manufacturers, which had been subject to regulation by the Commission for more than 15 years prior to the 1978 amendments, among the class of individuals likely to be unaware of their obligations under the Rules and in need of a special procedural protection in the forfeiture context.

12. When the Commission subsequently relaxed the equipment authorization rules in 1984 to permit authorization of television receivers and certain other devices under the verification procedure, it clearly did not intend to limit or reduce its future ability to take enforcement action.⁴¹ Rather, the Commission's objective was to reduce the amount of time needed for an applicant to obtain an equipment authorization for certain types of equipment that is less likely to generate harmful interference, while affording the Commission the flexibility to concentrate its resources where they are most needed.⁴² To ensure continued compliance of the verified equipment with applicable regulations, the Commission instituted an equipment sampling program and emphasized that it intended to use its enforcement authority under the Act, "especially the direct forfeiture authority contained in Section 503 and implemented in Section 1.80 of the Rules, to the greatest extent possible when noncompliance is found by our sampling program."⁴³ Accordingly, we conclude that Syntax-Brilliant, an equipment manufacturer that acknowledges that it was aware of the DTV tuner requirements, was not entitled to a citation prior to issuance of the *NAL*.⁴⁴

³⁹ See 47 C.F.R. § 2.907.

⁴⁰ S. REP. NO. 95-580, at 9.

⁴¹ See *Amendment of the Regulations to Expand the Notification and Verification Equipment Authorization Procedures*, Report and Order, 96 FCC 2d 948, 949 (1984) ("*Verification Report and Order*").

⁴² *Id.* at 954.

⁴³ *Id.* at 953. Cf. *Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Certificate of Compliance Process*, Report and Order, 69 FCC 2d 697, 704 (1978) (clarifying that the registration statement adopted for cable television operators in lieu of the certification process was sufficient authorization under Section 503 such that a forfeiture may be imposed without prior issuance of a citation). See also *Implementation of P.L. 97-257, Amendment of Section 1.80(d) of the Commission's Rules and Regulations*, Letter, 100 FCC 2d 968, 970 (1985) (affirming the denial of a petition for declaratory ruling seeking a ruling that, prior to the 1982 amendments to Section 503, cable operators were entitled to the initial warning protections provided in Section 503(b)(5) because they were not in the category of "licensees, permittees, holders of certificates, or of other authorizations" listed in that subsection).

⁴⁴ We note that the Commission has never previously addressed the legislative history set forth above or determined whether verification constitutes an "authorization" for purposes of Section 503(b)(5). To the extent that FCC precedent suggests a conclusion contrary to the one that we reach here, we hereby overrule such precedent on the (continued....)

B. Syntax-Brilliant's Labeling of its Receivers as "HD-Ready" Did Not Satisfy the DTV Tuner Requirement.

13. We find no merit in Syntax-Brilliant's argument that it did not violate the DTV tuner requirement because it "complied with the law by disclosing the functional limitations of the receivers."⁴⁵ Syntax-Brilliant states that its labeling of its receivers, which had the capability to tune and decode digital satellite and cable signals with an external tuner, as "HD Ready" was "consistent with established industry practices and *informal* Commission guidance."⁴⁶ Syntax-Brilliant claims, in this regard, that

[beginning in 2002 through May 2007, the Commission's policy was that it was not a violation to manufacture and market receivers that do not include the capability to tune over-the-air broadcast digital signals where the receivers are paired with digital cable or direct broadcast satellite service and the functional limitation is disclosed.⁴⁷

In support of this claim, Syntax-Brilliant quotes the following statement in the *DTV Review Second Report and Order*:

In the *Report and Order/Further Notice*, we observed that digital television receivers, *i.e.* devices with integrated displays as opposed to set-top receiving devices that do not include displays, could be marketed that do not have the capability to receive over-the-air broadcast signals. For example, receivers intended only for use in receiving digital cable or direct broadcast satellite service might not include the capability to tune over-the-air broadcast television signals⁴⁸

Syntax-Brilliant notes that the Commission had requested comment on whether to "require any digital television receivers that cannot receive over-the-air digital signals to carry a label informing consumers of this limitation on the receivers' functionality" but concluded in the *DTV Review Second Report and Order* that it would not, at that time, require such a label.⁴⁹ Syntax-Brilliant further notes that in 2004 and again in 2005 the Commission declined to promulgate a labeling requirement to disclose functional limitations, but encouraged responsible parties to clearly label new television receivers or employ other means to inform consumers whether or not specific models are able to receive over-the-air digital signals.⁵⁰ Thus, according to Syntax-Brilliant, at the time of its alleged violations the Commission had publicly acknowledged that manufacturers could import and ship receivers with functional limitations with a disclosure of the limitation.⁵¹ Syntax-Brilliant maintains that because the Commission did not adopt (Continued from previous page) _____

basis of the preceding analysis. *See, e.g., Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, 16 FCC Rcd 6417, 6464-65 (1999) (explaining that, for purposes of assessing forfeitures for violations of Section 255, a manufacturer "who does not hold any authorization from the Commission and is not otherwise engaged in activity for which such authorization is required is in a markedly different position than a common carrier against whom the Commission may assess a forfeiture for section 255 violations without first issuing a citation and providing an opportunity for corrective action."); *In the Matter of Rocky Mountain Radar*, 12 FCC Rcd 22453 (1997) (citation issued for manufacture and marketing of radar jamming devices in violation of Act and Commission rules) (subsequent history omitted).

⁴⁵ NAL Response at 31.

⁴⁶ *Id.* at 32 (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting *DTV Review Second Report and Order*, 17 FCC Rcd at 16003 ¶ 56).

⁴⁹ *Id.* (quoting *DTV Review Second Report and Order*, 17 FCC Rcd at 16003-4 ¶ 56, 59).

⁵⁰ *Id.* at 33-34.

specific labeling requirements until May 2007, Syntax-Brilliant acted reasonably in placing an “HD-Ready” label on its receivers.⁵²

14. We disagree. First, the DTV tuner requirement clearly and unequivocally requires all new TV broadcast receivers that are imported into the United States or shipped in interstate commerce to be capable of receiving the signals of DTV broadcast stations over-the-air in accordance with the schedule set forth in the Commission’s rules.⁵³ Syntax-Brilliant’s contention that the Commission had a “policy” of permitting the importation and interstate shipment of non-DTV-compliant television receivers provided that the receiver’s functional limitation is disclosed is specious. Syntax-Brilliant’s interpretation would allow manufacturers to continue importing and shipping interstate non-DTV-compliant receivers indefinitely, completely undermining the clear language and objectives of the DTV tuner requirement. Syntax-Brilliant’s interpretation also is inconsistent with a reasonable reading of the Commission’s orders. It is clear that, in the sentence from the *DTV Review Second Report and Order* quoted by Syntax-Brilliant, the Commission was considering whether to adopt labeling requirements for television receivers without *any* capability to receive over-the-air broadcast signals. Indeed, in the sentence following the one quoted, the Commission stated that “while we are not aware that any such receivers are being marketed at this time, such devices would be permissible under our rules” because “[t]he all-channel reception provisions of Section 15.117(b) of the rules, and indeed the ACRA authority underlying those provisions, would not apply to receivers that did not have *any* capability for receiving broadcast signals over-the-air.”⁵⁴ The receivers manufactured, imported and shipped interstate by Syntax-Brilliant, by contrast, have the capability to receive broadcast signals over-the-air and, therefore, are required to comply with the DTV tuner requirement.

15. Moreover, while the Commission did consider whether to adopt labeling requirements for receivers capable of receiving over-the-air broadcast signals in 2004 and in 2005, prior to the complete phase-in of the DTV tuner requirement for mid-sized receivers, the Commission did not adopt any labeling requirements at that time, and nothing in those decisions even remotely suggests that labeling or some other functional limitation disclosure was an acceptable substitute for compliance with the DTV tuner requirement.⁵⁵ We note that the labeling requirement ultimately adopted by the Commission in May 2007 applies to the retail sale of analog-only television receivers from inventory, a situation not covered by our DTV tuner requirement.⁵⁶ It cannot reasonably be read to allow importation and interstate shipment of receivers that do not comply with our DTV tuner requirement after the applicable deadlines. Finally, contrary to Syntax-Brilliant’s argument, the April 2006 tip sheet on “Buying a Digital Television” does not represent a public acknowledgment by the Commission that manufacturers could import and ship interstate receivers without DTV tuners with a disclosure of the limitation.⁵⁷ The tip sheet provides

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⁵¹ *Id.* at 34.

⁵² *Id.*

⁵³ 47 C.F.R. § 15.117(i)(1). *See supra* ¶¶ 2-3.

⁵⁴ *DTV Review Second Report and Order*, 17 FCC Rcd at 16003 ¶ 56 and n. 86 (emphasis added).

⁵⁵ *See DTV Tuner Report and Order*, 20 FCC Rcd at 11204 ¶ 19; *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18351-53 ¶¶ 166-68 (2004) (“*Second Periodic Review*”).

⁵⁶ *See Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order, 22 FCC Rcd 8776, 8782-83 ¶ 3 (2007) (“*Second Periodic DTV Review 2007*”).

⁵⁷ NAL Response at 34-37, citing <http://www.dtv.gov/dtvtipsheet.pdf> (stating that “DTV equipment may be purchased as an all-in-one or component solution. ‘Integrated’ DTV sets with built-in tuners are an all-in-one (continued....)”).

“basic information about DTV to assist consumers;”⁵⁸ it contains no information or guidance regarding manufacturer compliance with the DTV tuner requirement or Commission policy on equipment labeling.

C. The NAL and the Proposed Forfeiture Do Not Violate the Administrative Procedure Act (“APA”) or Syntax-Brilliant’s Due Process Rights.

16. We reject Syntax-Brilliant’s argument that it is arbitrary and capricious and an abuse of discretion under the APA for the Commission to impose a forfeiture in this case because most of the violations occurred between March 1, 2006 and June 1, 2006.⁵⁹ Syntax-Brilliant notes that it was “substantially compliant” with the original July 1, 2006 deadline by which responsible parties were to comply with the DTV tuner requirement for mid-size television receivers.⁶⁰ Further, it asserts that it was arbitrary and capricious, and an abuse of discretion, for the Commission to accelerate the mid-size receiver deadline because it did not provide a reasoned basis for doing so.⁶¹

17. Syntax-Brilliant’s argument is effectively an untimely petition for reconsideration of the *DTV Tuner Report and Order*, and a collateral attack on the rule underpinning the *NAL*. The filing of petitions for reconsideration in rulemaking proceedings is governed by Section 1.429 of the Rules, which requires a petition for reconsideration to be “filed within 30 days from the date of public notice of such action.”⁶² Petitions for reconsideration of the *DTV Tuner Report and Order* were, therefore, due on August 5, 2005.⁶³ The predecessor companies to Syntax-Brilliant (Syntax Groups Corporation and Brilliant Corporation) did not file a petition for reconsideration, though they had notice and opportunity to do so. Thus, Syntax-Brilliant’s *NAL* Response will be considered an untimely petition for reconsideration of the *DTV Tuner Report and Order* that must be denied. Moreover, the Commission has previously decided that indirect challenges to Commission decisions adopted in proceedings in which the right to review has expired, such as the instant one, are considered impermissible collateral attacks and are properly denied.⁶⁴

18. In addition to rejecting Syntax-Brilliant’s claim that accelerating the mid-size receiver deadline violates the APA on procedural grounds, we disagree with the substance of its argument that we did not provide a reasoned justification in the *DTV Tuner Report and Order* for accelerating the 100 percent compliance date for mid-size receivers. Our June 2005 decision to accelerate the compliance deadline for mid-size DTV receivers was reached following a rulemaking proceeding initiated by a

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solution for DTV – they include a digital tuner to receive over-the-air DTV broadcasts and a monitor to display the programming. A ‘component’ solution includes a DTV monitor (screen) without a DTV tuner (these monitors are sometimes labeled ‘HD Ready’). Monitors must be paired with a cable or satellite set-top box, or stand-alone DTV tuner.”).

⁵⁸ <http://www.dtv.gov/dtvtipsheet.pdf>.

⁵⁹ *NAL* Response at 40.

⁶⁰ *Id.*

⁶¹ *Id.* at 40-41.

⁶² 47 C.F.R. § 1.429(d).

⁶³ The *DTV Tuner Report and Order* was published in the Federal Register on July 6, 2005. See 70 Fed. Reg. 38800 (July 6, 2005). Therefore, a timely petition for reconsideration of the *DTV Tuner Report and Order* should have been filed not later than August 5, 2005.

⁶⁴ See, e.g., *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, 228, n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (*per curiam*).

Petition for Rulemaking submitted by the Consumer Electronics Association and the Consumer Electronics Retailers Association (“CEA-CERC”).⁶⁵ Key to our decision was that manufacturers commenting in that proceeding indicated they supported accelerating the date by which 100 percent of mid-size television receivers would be required to include a DTV tuner from July 1, 2006 to March 1, 2006 and could equip 100 percent of new mid-size television receivers with DTV tuners by March 1, 2006.⁶⁶ Based on the record developed in the rulemaking, we determined that the general population of television manufacturers would be able to meet the new deadline. Syntax-Brilliant has given us no persuasive reason to revisit that determination.⁶⁷

19. Syntax-Brilliant also argues that the *NAL* violates its Fifth Amendment due process rights because it proposes a forfeiture “without having previously articulated a coherent legal standard permitting Syntax-Brilliant to measure the efficacy of its labeling disclosure which the *NAL* rejects as inadequate.”⁶⁸ As discussed above, however,⁶⁹ the standard Syntax-Brilliant was required to follow is contained in Section 15.117 of our Rules and is clearly articulated. Syntax-Brilliant failed to follow this standard. Accordingly, we reject Syntax-Brilliant’s due process argument.⁷⁰

D. The Tiered, Per-Unit Formula Used to Calculate the Proposed Forfeiture Does Not Violate the APA or Due Process.

20. We find, contrary to Syntax-Brilliant’s argument, that the tiered, per-unit formula articulated in the *NAL* does not substantively amend the DTV tuner regulations without notice and comment and, therefore, does not violate the APA.⁷¹ Syntax-Brilliant maintains that the Commission had numerous opportunities in the DTV rulemaking proceeding to issue public notice and request comment on the method of calculating sanctions proposed in the *NAL* and that “it knew full well ... that the violations are not contemplated in the *Forfeiture Policy Statement*.”⁷²

21. The APA does not mandate that the Commission issue notice and request comment each time it proposes a forfeiture or a forfeiture approach for rule violations not specifically contemplated at the time the *Forfeiture Policy Statement* was adopted. The forfeiture guidelines set forth in the *Forfeiture Policy Statement* are intended to provide a degree of predictability and uniformity to the forfeiture process.⁷³ Nevertheless, the Commission retains its discretion to assess forfeitures on an individual, case-

⁶⁵ *DTV Tuner Report and Order*, 20 FCC Rcd at 11196 ¶ 1.

⁶⁶ *Id.* at 11204 ¶ 20.

⁶⁷ *See also infra* ¶¶ 41-42.

⁶⁸ *NAL Response* at 44.

⁶⁹ *See supra* ¶¶ 13-15.

⁷⁰ *See, e.g., General Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (under fair notice principle, which is grounded in due process but has now been incorporated into administrative law, an agency may impose civil or criminal liability provided that “a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform.” (*citing Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *Diamond Roofing Company, Inc. v. Occupational Safety and Health Review Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976)).

⁷¹ *Id.* at 48.

⁷² *Id.*

⁷³ *See Forfeiture Policy Statement*, 12 FCC Rcd at 17092-93 ¶ 8.

by-case basis under its general forfeiture authority in Section 503 of the Act.⁷⁴ As noted in the *NAL*, Section 503 authorizes us to assess forfeitures to entities such as Syntax-Brilliant of up to \$11,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$97,500 for a single act or failure to act.⁷⁵ Pursuant to Section 503(b), weighing the factors set forth in the statute, the Commission may determine the appropriate forfeiture within the range permitted by the statute.⁷⁶ Thus, Syntax-Brilliant had full notice under the APA that the maximum potential forfeiture for *each* violation – that is, each unit shipped or imported in violation of the DTV tuner requirement – could be the statutory maximum.⁷⁷

22. We also reject Syntax-Brilliant's assertion that our decision to adopt a tiered, per-unit formula for calculating forfeitures for violations of the DTV tuner requirement arbitrarily and capriciously rejects a per model approach without adequate justification.⁷⁸ Syntax-Brilliant claims that the only factor cited by the Commission to support a finding that the violation was egregious is the assertion that the company imported and shipped interstate a large number of non-compliant television receivers, and points out that the quantity of violations was miscalculated.⁷⁹ We disagree. As we stated in the *NAL*, we consider violations of the DTV tuner requirement to be more egregious, in general, than other types of equipment marketing cases because this requirement promotes an important public policy goal of helping to facilitate the transition to digital television.⁸⁰ Without a digital-to-analog converter box, consumers using analog devices like those imported and shipped by Syntax-Brilliant will be unable to receive most broadcast television signals after February 17, 2009. Thus, our assessment that the seriousness of DTV tuner requirement violations warrants a per-unit approach does not rest on the number of units imported or shipped interstate by any one responsible party in violation of the DTV tuner requirement, but, rather, on the conclusion that calculating proposed forfeitures on a per model basis would result in forfeiture amounts that are not commensurate with the seriousness of the violation and may not effectively deter future violations.⁸¹ We further concluded that, to reflect the increasing seriousness of the violation as the number of non-compliant units shipped or imported rises, we would apply an increased per-unit forfeiture as the total number of violations increases and crosses certain thresholds or tiers.

23. Syntax-Brilliant also asserts that the tiered, per-unit forfeiture scheme is excessive, unlawfully duplicative, and an abuse of our discretion because it considers importing and interstate shipping of a single receiver as separate violations.⁸² Specifically, Syntax-Brilliant argues that the *NAL*

⁷⁴ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 23; see also 47 C.F.R. § 1.80(b)(4) (“The Commission and its staff *may* use these guidelines in particular cases [, and] *retain the discretion* to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.”) (emphasis added).

⁷⁵ *NAL*, 22 FCC Rcd at 10534-35 ¶ 11.

⁷⁶ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a), (b); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-1 ¶ 27.

⁷⁷ See *Globcom, Inc. d/b/a Globom Global Commun.*, Order of Forfeiture, 21 FCC Rcd 4710, 4723 ¶ 35 (2006) (“*Globcom*”).

⁷⁸ *NAL Response* at 49.

⁷⁹ *Id.* at 49-50 (citing *NAL*, 22 FCC Rcd at 10535 n. 39). We address Syntax-Brilliant's arguments concerning the calculation of the number of violations at ¶¶ 31-35, *infra*.

⁸⁰ *NAL*, 22 FCC Rcd at 10535 ¶ 13.

⁸¹ *Id.*

⁸² *NAL Response* at 50-51.

proposes forfeitures “for multiple . . . individual equipment violation[s] without explanation” that are “unprecedented” and “an abuse of discretion.”⁸³ Section 15.117 clearly imposes two distinct prohibitions on responsible parties: it prohibits either importing or shipping interstate television receivers that do not contain digital tuners. We find, however, that treating the importation and subsequent interstate shipment of the same television receiver as two separate violations is unnecessary. Given that the DTV tuner rule is meant to ensure that all television receiving devices are equipped with a digital tuner, we conclude that the purpose of the rule will best be served by treating the importation and subsequent interstate shipment of the same receiver as a single violation. In future forfeiture actions taken for violations of the DTV tuner requirement, we will assess the facts of each case in determining how best to enforce the requirements of Section 15.117 using this interpretation. Because we cannot determine how many of the units imported by Syntax-Brilliant were not subsequently shipped interstate, we will not impose a forfeiture against Syntax-Brilliant for the 3,466 non-DTV-compliant receivers it imported.⁸⁴

24. We find no merit, however, in Syntax-Brilliant’s argument that the *NAL* is predicated on the Commission’s unwarranted rejection of the statutory maximum and is devoid of any explanation as to why the statutory maximum would not encourage compliance.⁸⁵ As stated in the *NAL*, Section 503 authorizes us to assess forfeitures against entities such as Syntax-Brilliant of up to \$11,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$97,500 for a single act or failure to act.⁸⁶ Each separate interstate shipment of a non-DTV-compliant receiver by Syntax-Brilliant constituted a separate violation subject to the statutory maximum forfeiture. Because the per-unit forfeiture amounts proposed against Syntax-Brilliant did not exceed \$175 per unit, this conclusion stands whether that relevant maximum forfeiture amount is \$11,000 or \$97,500. Thus, the tiered, per-unit approach established in the *NAL* results in a forfeiture amount that is actually significantly *lower* than the maximum potential forfeiture.

25. Further, we find unpersuasive Syntax-Brilliant’s argument that the per-unit forfeiture approach is excessive relative to the forfeitures proposed by the Commission for “substantially more egregious” DTV labeling violations.⁸⁷ In support of this argument, Syntax-Brilliant notes that in the recent DTV labeling *NALs*, the Commission proposed an \$8,000 base forfeiture amount per unlabeled model or device.⁸⁸ We disagree with Syntax-Brilliant that DTV labeling violations are more egregious than DTV tuner violations. The failure of a manufacturer to comply with the DTV tuner requirement, which has been in place in some form for more than five years and is intended to limit the availability of analog-only television receivers, is substantially more egregious than the failure of a retailer to comply with the DTV labeling requirements, which permit the sale of analog-only receivers, as long as consumers are fully informed about the limitations of those devices. Although the DTV tuner requirement and the DTV labeling requirement both address the issue of consumer harm, we consider violations of the DTV tuner requirement to be more egregious because that requirement is fundamental to a successful DTV

⁸³ *Id.*

⁸⁴ *See also infra* ¶ 33.

⁸⁵ *NAL* Response at 51.

⁸⁶ *NAL*, 22 FCC Rcd at 10534-35 ¶ 11.

⁸⁷ *NAL* Response at 51.

⁸⁸ *Id.* We note that the *NALs* cited by Syntax-Brilliant were issued by the Enforcement Bureau, not the Commission. *See, e.g., RadioShack Corporation*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 18437 (Enf. Bur. 2007) (*response received*).

transition: it prevents non-compliant, analog-only television receivers from entering the stream of commerce in the first place. By contrast, the DTV labeling requirement is primarily informational in nature. It mitigates the harm resulting from the sale of analog-only television receivers from pre-March 1, 2007 inventory, which will eventually be exhausted, by requiring retailers to disclose the limitations of the devices to consumers at the point of sale.⁸⁹

26. Finally, we disagree with Syntax-Brilliant's assertion that "the per-unit policy injects uncertainty into the forfeiture process in a manner completely at odds with the Commission's stated objectives."⁹⁰ As discussed above, the guidelines set forth in the *Forfeiture Policy Statement* were intended to provide a degree of predictability and uniformity to the forfeiture process, but the Commission has substantial discretion in proposing forfeitures.⁹¹ Furthermore, the per-unit forfeiture methodology will provide consistency and predictability in any future cases involving violations of the DTV tuner requirements.⁹²

E. The Proposed Forfeiture Is Not Inconsistent with Commission Precedent.

27. We reject Syntax-Brilliant's argument that the proposed forfeiture departs from prior Commission cases imposing large forfeitures based on conduct deemed to be egregious.⁹³ In particular, Syntax-Brilliant cites our recent decision in *Behringer*.⁹⁴ Syntax-Brilliant asserts that Behringer's conduct was far more egregious given the quantity of affected models and units in *Behringer* and the fact that Behringer continued to violate the rules after the investigation had begun, which resulted in a forfeiture of \$1,000,000, approximately one-third of the amount proposed against Syntax-Brilliant.⁹⁵ Syntax-Brilliant also cites several slamming and other cases involving "deceptive business practices," asserting that the forfeiture proposed here is vastly more substantial than any assessed against companies which actively deceived consumers after the Commission specifically warned them not to do so.⁹⁶

28. While we acknowledge that *Behringer* involved a significant volume of unauthorized models and units, we note that all but two of the models at issue in *Behringer* were ultimately found to

⁸⁹ *Second Periodic DTV Review 2007*, 22 FCC Rcd at 8784 ¶ 14.

⁹⁰ *Id.* at 52 (citing *Forfeiture Policy Statement*, 12 FCC Rcd at 17101 ¶ 29 ("the predictability in the forfeiture process is an important objective and adherence to the guidelines is a method to achieve this goal")).

⁹¹ See, e.g., *InPhonic, Inc.*, Order of Forfeiture and Further Notice of Apparent Liability, 22 FCC Rcd 8689, 8699 ¶ 24 (2007); *Globcom*, 21 FCC Rcd at 4723-24 ¶¶ 36-37.

⁹² See *NAL*, 22 FCC Rcd at 10535 n. 36 (noting that "this forfeiture calculation methodology is consistent and predictable when applied to different factual scenarios").

⁹³ NAL Response at 53.

⁹⁴ *Id.*

⁹⁵ *Id.* at 53-55.

⁹⁶ *Id.* at 5755-56 (citing *Webnet Communications, Inc.* Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 11603 (2002); *Vista Group International, Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 13814 (1999); *All American Telephone Company, Inc.*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 15040 (1998); *Amer-I-Net Services Corporation*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 22055 (1998); *Brittan Communications International Corp.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 296 (1998); *NOS Communications, Inc. and Affinity Network Incorporated*, Notice of Apparent Liability for Forfeiture 16 FCC Rcd 8133 (2001); and *Business Discount Plan*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 340 (1998)).

comply with applicable technical standards.⁹⁷ In contrast, the devices manufactured, imported and shipped interstate by Syntax-Brilliant do not comply with the DTV tuner requirement. Thus, the harm to consumers resulting from Syntax-Brilliant's non-compliance makes this case substantially more egregious than *Behringer*. Furthermore, contrary to Syntax-Brilliant's suggestion, we are not required to issue prior warnings or find that it deceived consumers in order to find that its violations were egregious. We concluded in the *NAL* that the DTV tuner requirement promotes the important public policy goal of facilitating the transition to digital television and that violations of this requirement therefore are egregious.⁹⁸ Syntax-Brilliant has given us no persuasive reason to revisit that finding. Although Syntax-Brilliant, unlike the manufacturer in *Behringer* and other cases that Syntax-Brilliant cites, may not have actively deceived consumers after a specific Commission warning, Section 503(b)(2)(E) of the Act requires that we take into account multiple factors in assessing forfeitures, and we cannot conclude based on consideration of a single factor that the sanction here is inconsistent with Commission precedent.

29. We also reject Syntax-Brilliant's assertion that the per-unit forfeiture scheme articulated in the *NAL* violates the Excessive Fines Clause of the Eighth Amendment because it is "indefinite, unlimited and grossly disproportionate" to the DTV violation cited in the *NAL*.⁹⁹ In support of this argument, Syntax-Brilliant cites *United States v. Bajakajian*, where the government sought the forfeiture of the entire amount of currency (\$357,144) possessed by a defendant who violated a statute requiring that the export of more than \$10,000 outside the United States be reported.¹⁰⁰ Noting that the defendant's crime was solely a reporting offense, that the violation was unrelated to any other illegal activities, and that the harm caused by the reporting failure was minimal, the Court concluded that forfeiture of the entire amount of the exported currency would be grossly disproportionate to the gravity of the reporting failure.¹⁰¹ The instant case, by contrast, involves a violation of the substantive requirement to include a DTV tuner in receivers imported and shipped interstate. Given that this requirement is critical to the successful transition to digital television and the harm to consumers that results from non-compliance, we do not believe that the per-unit forfeiture approach results in a forfeiture amount that is grossly disproportionate to the gravity of the violation. Nor does the per-unit forfeiture methodology produce an indefinite or unlimited forfeiture. Rather, as discussed above, the forfeiture amount is limited by the statutory maximum set forth in Section 503(b)(2)(D) of the Act.

F. New Information Provided by Syntax-Brilliant Warrants Adjustment of the Forfeiture Amount.

30. We agree that, in some aspects, the *NAL* overstates the number of units imported and shipped interstate in violation of the DTV tuner requirement. Specifically, Syntax-Brilliant believes that the number of non-compliant units shipped interstate should be reduced from 14,894 units to 4,282 to

⁹⁷ *Behringer*, 21 FCC Rcd at 1823 ¶ 8; 22 FCC Rcd at 10459 ¶ 18.

⁹⁸ *NAL*, 22 FCC Rcd at 10535 ¶ 13.

⁹⁹ *NAL* Response at 53, n. 91. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹⁰⁰ 534 U.S. 321 (1998) ("*Bajakajian*"). Syntax-Brilliant also cites *Austin v. United States*, 509 U.S. 602, 622-623 (1993) ("*Austin*") (remanding the case to the Court of Appeals after finding the Court of Appeals should have considered petitioner's claims that the forfeiture was excessive within the meaning of the Eighth Amendment) and *Alexander v. United States*, 509 U.S. 544, 559 (1993) ("*Alexander*") (addressing only the question of whether the Eighth Amendment applied and, finding that it did, remanding the case to the Court of Appeals). Neither *Austin* nor *Alexander* provides any support for Syntax-Brilliant's argument that the *NAL*'s proposed forfeiture violates the Eighth Amendment as they do not discuss the standard to be used to make this determination.

¹⁰¹ *Bajakajian*, 534 U.S. at 339-340.

reflect the following: 1) use of the correct Tolling Date of April 30 rather than April 27 requires the elimination of 156 non-compliant units shipped interstate; 2) 3,370 of the number of units cited in the *NAL* were *intrastate* rather than *interstate* shipments; and 3) 7,086 of the non-compliant units shipped interstate should be eliminated from the number of units used to calculate the forfeiture because the Tolling Agreement was breached and is therefore unenforceable.¹⁰² Additionally, Syntax-Brilliant states that the number of units imported is 3,466, not 7,175 as stated in the *NAL*, and that number should be reduced by 3,102 to reflect the unenforceability of the Tolling Agreement.¹⁰³

31. As a threshold matter, the number of non-compliant units within the Statute of Limitations was predicated on use of an April 30 tolling date, not April 27 as maintained by Syntax-Brilliant. Therefore, there is no need to reduce the number of non-compliant units shipped interstate by the 156 units cited by Syntax-Brilliant.¹⁰⁴ As to the second point regarding intrastate shipments, the forfeiture proposed in the *NAL* was based on the information submitted by Syntax-Brilliant in its LOI Response, which characterized all of the shipments as interstate.¹⁰⁵ Based on Syntax-Brilliant's new representations in its NAL Response that 3,370 of the units that the company originally characterized as interstate shipments are actually *intrastate* shipments,¹⁰⁶ we find it appropriate to reduce the number of units shipped interstate by that amount.

32. Syntax-Brilliant also disagrees with the number of receivers identified in the *NAL*, 7,175, as having been imported within the statute of limitations. It believes that the number is actually 3,466.¹⁰⁷ After further reviewing Syntax-Brilliant's LOI Response,¹⁰⁸ and based on new information provided by Syntax-Brilliant in its NAL Response which shows that 1,390 units listed in the LOI Response as imports were not actually imported into the United States,¹⁰⁹ we concur with Syntax-Brilliant that the number of units imported within the statute of limitations in violation of the DTV tuner requirement is 3,466.

¹⁰² NAL Response at 30 (citing Tolling Agreement, File No. EB-07-SE-023, executed by and between William H. Davenport, Assistant Chief, Enforcement Bureau, Federal Communications Commission, and Michael J. Miller, General Counsel, Syntax-Brilliant Corporation (April 30, 2007) ("Tolling Agreement")).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ In its response to questions 1(c) and 2(c) of the LOI, which requested the number of certain mid-size receivers shipped interstate, Syntax-Brilliant stated that the total number of receivers "shipped *interstate* after March 1, 2006, is identified in Exhibit 2." LOI Response at 2, 6 (emphasis added). Similarly, in response to question 3(c) of the LOI, which requested the total number of large-size receivers shipped interstate, Syntax-Brilliant stated "See Exhibit 3." LOI Response at 8. Nowhere in its LOI Response did Syntax-Brilliant state that either Exhibit 2 or Exhibit 3 also included *intrastate* shipments. Further, Syntax-Brilliant did not explain in its NAL Response why it included intrastate shipments in its LOI Response.

¹⁰⁶ NAL Response at 30.

¹⁰⁷ *Id.*

¹⁰⁸ It appears that the *NAL* erroneously included certain negative importations listed by Syntax-Brilliant in its LOI response, i.e., television receivers that were imported into the United States but then were subsequently exported. Exclusion of these receivers results in a reduction of the total number of receivers imported from 7,175 to 4,856.

¹⁰⁹ In its NAL Response, Syntax-Brilliant provided documentation, including invoices, packing lists and purchase orders, which indicate that 1,390 units that it had listed as imports in its LOI Response were in fact shipped to Hong Kong, rather than the United States.

However, for the reasons noted above, we will not impose a forfeiture against Syntax-Brilliant for this violation.¹¹⁰

33. Syntax-Brilliant's arguments concerning the Tolling Agreement lack merit. On April 30, 2007, after Syntax-Brilliant raised the possibility of settlement, the Commission executed a Tolling Agreement with it. Syntax-Brilliant's argument is, essentially, that the Commission breached the April 30, 2007 Tolling Agreement by issuing the *NAL* rather than entering into a consent decree with it.¹¹¹ However, a Tolling Agreement is not a bilateral contract between the Commission and a party that obligates the Commission to enter into a Consent Order.¹¹² Instead, a Tolling Agreement is simply a tool used to facilitate consent decree negotiations by extending the amount of time available for the Commission and the signatory party to conduct negotiations.¹¹³ The Tolling Agreement explicitly states that "[t]he Commission has made no promises, representations, or inducements of any kind to Syntax-Brilliant in connection with this Tolling Agreement."¹¹⁴ Furthermore, the Tolling Agreement provides that "Syntax-Brilliant further understands and agrees that it shall not rely on the Tolled Period in any administrative or judicial proceeding in which it may argue that the issuance of a notice of apparent liability for forfeiture or such other proposed action or action by the Commission or its delegated authority arising from the investigation . . . is barred by the statute of limitations."¹¹⁵ Thus, Syntax-Brilliant has no basis for arguing either that the Commission breached the Tolling Agreement or that expiration of the limitations period bars the Commission from sanctioning it for actions that occurred during the Tolled Period. We also note that Syntax-Brilliant's argument that the staff misled or deceived it lacks merit: the Commission's course of action was largely due to Syntax-Brilliant's inaction. Five weeks after meeting with Commission staff, Syntax-Brilliant had neither responded to a request from staff for information concerning additional non-DTV-compliant receivers that it imported into the United States nor presented any consent decree proposal.¹¹⁶ Accordingly, the Commission issued the *NAL*.¹¹⁷ For all of these reasons, we decline to reduce the number of DTV receivers shipped interstate by 7,086 as requested by Syntax-Brilliant on the ground of the Tolling Agreement's alleged unenforceability.¹¹⁸

¹¹⁰ See *supra* ¶ 23.

¹¹¹ *NAL* Response at 30, 61.

¹¹² *Id.* at 61 (where Syntax-Brilliant states that it "performed" by executing the Tolling Agreement based on its understanding that this meant no *NAL* would issue).

¹¹³ *In the Matter of Local Phone Service, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 9974, 9976-79 ¶ 5, n. 19 and ¶ 13 (2006) ("*Local Phone Service NAL*").

¹¹⁴ Tolling Agreement at ¶ 6(c).

¹¹⁵ *Id.* at ¶ 6(a).

¹¹⁶ Specifically, the staff had requested that Syntax-Brilliant provide information regarding its importation and interstate shipment of its Model LT20S receiver, a 20" television receiver that includes an analog tuner. According to Customs importation data, Syntax-Brilliant imported 788 units of the LT20S receiver on March 3, 2007, after the March 1, 2007 deadline to cease importing non-DTV-compliant receivers with screen sizes less than 25". Subsequent to issuance of the *NAL*, Syntax-Brilliant confirmed that it did import units of the LT20S receiver after March 1, 2007, but indicated that these units were distributed to Syntax-Brilliant employees and were not sold. Since these units were not imported *for sale* in the United States, they do not come within the purview of Section 15.117(i)(1)(iii).

¹¹⁷ See, e.g., *Local Phone Service NAL*, 21 FCC Rcd at 9976 ¶ 5, n. 19.

¹¹⁸ *NAL* Response at 30.

34. After removing the 3,370 DTV receivers now found to have been shipped intrastate rather than interstate as reported in Syntax-Brilliant's LOI Response and the 3,466 DTV receivers Syntax-Brilliant imported into the United States, the total number of units upon which we base the forfeiture issued today is 11,524 (14,894-3,370 shipped interstate). Applying the forfeiture calculation methodology outlined in the *NAL* results in a forfeiture of \$1,266,100.¹¹⁹

G. Syntax-Brilliant Has Presented No Mitigating Factors Warranting Further Reduction of the Proposed Forfeiture.

35. As discussed below, we find that Syntax-Brilliant's additional arguments do not warrant any further reduction of the proposed forfeiture. Specifically, Syntax-Brilliant states that the forfeiture should be reduced because it has no history of violations of either the DTV tuner requirement or any other Rule, the period of non-compliance was brief and ceased before the *NAL* was issued, it discontinued importation and interstate shipment of non-compliant models prior to the issuance of the *NAL*, it made good faith disclosures after the *NAL* was issued, it implemented corrective measures, and discontinued all the models cited in the *NAL* before the Commission initiated its investigation.¹²⁰ Further, Syntax-Brilliant states that there have been no allegations of misrepresentation by it, that there has been no harm to the public, the majority of its violations occurred between March 1, 2006 and July 1, 2006, and that, as a small business, it was unable to meet the accelerated deadline of March 1, 2006 for mid-size DTV receivers.¹²¹

36. Syntax-Brilliant states, correctly, that a party's prior history of compliance with our Rules is one factor that is used when determining a forfeiture amount. However, forfeitures are not automatically increased or decreased on a factor-by-factor basis. Instead, we consider the record of an investigation as a whole and the particular facts of a case.¹²² As long as there is a rational relationship between the factors used in arriving at a forfeiture and the level of the forfeiture, we may decline to assign any weight to a particular factor in a given case.¹²³ In this case, because the DTV tuner requirement has been found to be central to the successful transition from analog to digital television, we found that violations of the DTV tuner requirement were more egregious than violations of other equipment marketing rules.¹²⁴ For this reason, we established the per-unit forfeiture guideline and articulated it in the *NAL*.¹²⁵ Our goal was to keep non-compliant television receivers out of the stream of commerce. Given the egregious nature of Syntax-Brilliant's violations and the importance of the DTV tuner requirement, we cannot conclude that Syntax-Brilliant's prior history of compliance warrants any

¹¹⁹ We derived this amount as follows: (1000 units * \$50/unit) + (1500 units * \$75/unit) + (2500 units * \$100/unit) + (5000 units * \$125/unit) + (1,524 units * \$150/unit) = \$1,266,100. See *NAL*, 22 FCC Rcd at 10535 ¶ 13-15.

¹²⁰ *NAL* Response at 58-60.

¹²¹ *NAL* Response at 58-60.

¹²² See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 23; see also 47 C.F.R. §1.80(b)(4) ("The Commission and its staff may use these guidelines in particular cases [, and] retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (emphasis added).

¹²³ See, e.g., *SBC Communications, Inc. v. FCC*, 373 F.3d 140, 151-52 (D.C. Cir. 2004) (finding that, even though the FCC considered, but may not have assigned any weight to, each of the factors in section 503(b)(2)(E), as long as there is a "rational relationship between [the factors used] and the extent of the fine" its application of the statutory factors is reasonable).

¹²⁴ *NAL*, 22 FCC Rcd at 10535 ¶ 13.

¹²⁵ *Id.* at 10535-36 ¶ 15.

reduction in forfeiture because to do so would result in a forfeiture that is not commensurate with the gravity of its offense.¹²⁶ Therefore, we will not reduce the proposed forfeiture because of Syntax-Brilliant's prior history of compliance.

37. Additionally, we decline to consider Syntax-Brilliant's actions as mitigating the proposed forfeiture because it implemented corrective measures, made its disclosures, and ceased importing and shipping non-DTV compliant television receiver models only *after* the Commission initiated an investigation of non-compliant DTV receivers that were imported by Syntax-Brilliant. Such corrective actions taken after the Commission initiates an investigation, while laudable and important, are not a mitigating factor warranting reduction of a forfeiture.¹²⁷

38. Syntax-Brilliant also asserts that the forfeiture should be reduced because no allegation of misrepresentation has been made against it.¹²⁸ Misrepresentation is considered a separate violation that is typically assessed at the statutory maximum for the service provided by the violator.¹²⁹ It is not one of the statutory factors used to increase or decrease forfeitures and we, therefore, decline to consider this as a factor in mitigation of the forfeiture.

39. We also reject Syntax-Brilliant's public harm argument.¹³⁰ Syntax-Brilliant is correct that, under normal circumstances, the majority of end users of DTV receivers will not be affected by the DTV transition because they receive video programming via cable or satellite.¹³¹ Nevertheless, as discussed above, we believe that the importation and interstate shipment of non-DTV-compliant receivers after the applicable deadlines does result in harm to consumers. As we stated in the *Second Periodic DTV Review 2007*, consumers expect that television equipment purchased today has the capability to receive over-the-air broadcast now and will continue to have that capability even after the completion of the DTV transition.¹³² Continued importation and interstate shipment of non-DTV-compliant television receivers causes consumer disruption and confusion inconsistent with a smooth transition to digital broadcasting, misleads consumers who may be unaware of the transition to digital broadcast, may lead to loss of service, and could impede the dissemination of emergency information in case of disaster.¹³³ Therefore, we will not reduce the proposed forfeiture as Syntax-Brilliant requests.

¹²⁶ See, e.g., *All American Telephone, Inc.*, Forfeiture Order, 16 FCC Rcd 16601, 16609-10 ¶ 19 (2001) (history of compliance not a mitigating factor warranting reduction of forfeitures assessed for slamming violations by a common carrier because of the egregious nature of the violations).

¹²⁷ See e.g., *United States Cellular Corporation*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 16424 ¶ 14 (2007) (remedial efforts taken by a wireless carrier after the deadline for compliance with the E911 95 percent handset penetration requirement not a mitigating factor warranting reduction of forfeiture) (forfeiture paid); *AT&T Wireless Services, Inc.*, Forfeiture Order, 17 FCC Rcd 21866, 21875-6 ¶¶ 26-28 (2002) (remedial action to correct tower painting violation was not a mitigating factor warranting reduction of forfeiture); *Seawest Yacht Brokers*, Forfeiture Order, 9 FCC Rcd 6099, 6099 ¶ 7 (1994) (corrective action taken to comply with the Rules is expected, and does not mitigate any prior forfeitures or violations).

¹²⁸ NAL Response at 59.

¹²⁹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17098 ¶ 21; see also 47 C.F.R. § 1.17.

¹³⁰ NAL Response at 50 n. 85, 59-60.

¹³¹ *Id.* at 50 n. 85 (citing *Second Periodic DTV Review 2007* at ¶ 14).

¹³² *Id.* at ¶ 1.

¹³³ *Id.* at ¶¶ 4-5, 11-12.

40. Finally, Syntax-Brilliant states that, as a small business formed shortly before the March 1, 2006 deadline, it was unable to meet the revised deadline for mid-size DTV receivers and that most of its violations occurred between March 1, 2006 and July 1, 2006.¹³⁴ However, Syntax-Brilliant represents the merger of two companies, both of which were involved with manufacturing and distributing television receiving equipment prior to the merger.¹³⁵ Both companies, therefore, had notice of both the original and modified deadlines for compliance with the DTV tuner requirement.¹³⁶ Furthermore, as previously discussed, our June 2005 decision to accelerate the compliance deadline for mid-size DTV receivers was based on our determination in a rulemaking proceeding that the general population of television manufacturers would be able to meet the new deadline.¹³⁷ Syntax-Brilliant's assertion of its status as a small business is insufficient for us to conclude that they are not properly included in that general population of television manufacturers. In this regard, Syntax-Brilliant has not specifically explained why such status prevented its compliance, and, as discussed above, neither Syntax-Brilliant nor its predecessors raised any concerns about compliance with the Commission in a timely manner.

41. In accelerating the 100 percent compliance date, we also determined that maintaining the requirement that 50 percent of mid-size television receivers be equipped with DTV tuners by July 1, 2005, rather than eliminating that benchmark completely, would best serve our goal of advancing the DTV transition by stemming the flow of analog-only television receivers as quickly as possible.¹³⁸ Thus, Syntax-Brilliant should already have been preparing to meet the 50 percent compliance date, which occurred only three weeks after release of the *DTV Tuner Report and Order*, when it received notice of the acceleration of the 100 percent compliance date. While it is factually correct, then, that it was "substantially in compliance" with the original 100 percent compliance date of July 1, 2006 and most of its violations occurred between March 1, 2006 and July 1, 2006, Syntax-Brilliant has not persuaded us that accelerating the deadline placed an undue burden on it that justifies reducing the proposed forfeiture. Therefore, we affirm our finding in the *NAL* that Syntax-Brilliant's status as a small business is not a factor in mitigation of the forfeiture amount.

IV. NOTICE OF APPARENT LIABILITY FOR FORFEITURE

A. Syntax-Brilliant Violated Section 1.17(a)(2) of the Rules.

42. Section 1.17(a)(2) of the Rules provides that no person may provide, in any written statement of fact, "material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading."¹³⁹ Any person who has received a letter of inquiry from the Commission or its staff or is otherwise the subject of a Commission investigation is subject to this rule.¹⁴⁰ In expanding the scope of Section 1.17 in 2003 to include written statements that are made without a reasonable basis for believing the statement is correct and not misleading, the Commission explained that this requirement was intended

¹³⁴ NAL Response at 58, 60.

¹³⁵ According to Syntax-Brilliant's website, the Syntax Groups Corporation was founded in May 2003 and the Brilliant Corporation was founded in 1997. See <http://www.syntaxbrilliant.com/company/history.html>.

¹³⁶ *NAL*, 22 FCC Rcd at 10537 ¶ 19.

¹³⁷ See *supra* ¶ 18; see also *DTV Tuner Report and Order*, 20 FCC Rcd at 11196 ¶¶ 1, 20.

¹³⁸ *Id.* at 11203 ¶ 17.

¹³⁹ 47 C.F.R. § 1.17(a)(2).

¹⁴⁰ 47 C.F.R. § 1.17(b)(4).

to more clearly articulate the obligations of persons dealing with the Commission, ensure that they exercised due diligence in preparing written submissions, and enhance the effectiveness of the Commission's enforcement efforts.¹⁴¹ Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if provided without a reasonable basis for believing that the material factual information it contains is correct and not misleading.¹⁴²

43. As noted above, Syntax-Brilliant acknowledged in its NAL Response that both the import and interstate shipment data in the LOI Response were incorrect.¹⁴³ Specifically, with respect to 1,390 non-DTV-compliant receivers that it had listed as imports in its LOI Response, Syntax-Brilliant provided documentation with its NAL Response indicating that these receivers were not imported into the United States, but rather were shipped to Hong Kong.¹⁴⁴ In addition, in response to questions in the LOI requesting the number of non-DTV-compliant receivers shipped interstate, Syntax-Brilliant stated in its LOI Response that the total number of receivers "shipped interstate ... is identified in Exhibit 2" and "See Exhibit 3."¹⁴⁵ Nowhere in the LOI Response did Syntax-Brilliant state that these Exhibits also included *intrastate* shipments. In its NAL Response, however, Syntax-Brilliant for the first time identified certain of these shipments as *intrastate*, rather than *interstate*.¹⁴⁶

44. As we have stated, parties must "use due diligence in providing information that is correct and not misleading to the Commission, including taking appropriate affirmative steps to determine the truthfulness of what is being submitted. A failure to exercise such reasonable diligence would mean that the party did not have a reasonable basis for believing in the truthfulness of the information."¹⁴⁷ Syntax-Brilliant has not articulated a reasonable basis for its belief that the import and interstate shipment data in its LOI Response were correct, nor has it provided any reason for its provision of incorrect or misleading information. We think that, had it exercised even a minimum of diligence prior to the submission of its LOI Response, Syntax-Brilliant would not have submitted incorrect or misleading material factual information.¹⁴⁸ We conclude, therefore, that Syntax-Brilliant lacked a reasonable basis for its belief that its LOI Response was correct and not misleading in apparent violation of Section 1.17(a)(2) of the Rules.

¹⁴¹ *In the Matter of Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016, 4016-17 ¶ 1-2, 4021 ¶ 12 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 5790, *further recon. denied*, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004) ("Amendment of Section 1.17").

¹⁴² *See id.* at 4017 ¶ 2 (stating that the revision to Section 1.17 is intended to "prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive").

¹⁴³ NAL Response at 30; *see also supra* ¶¶ 31-35.

¹⁴⁴ NAL Response at 30.

¹⁴⁵ LOI Response at 2, 6, and 8.

¹⁴⁶ NAL Response at 30, Exhibit 1.

¹⁴⁷ *Amendment of Section 1.17*, 18 FCC Rcd at 4021 ¶ 12.

¹⁴⁸ *See, e.g., In re Applications of Citicasters License, L.P., et al.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324, 19338 ¶ 40 (2007) (forfeiture paid) (finding that a licensee's false certification that it had not violated the Act or any Commission rules during the preceding license term had no reasonable basis but was not made with the intent to deceive Commission and, therefore, violated Section 1.17(a)(2) of the rules) ("*Citicasters*").

B. Proposed Forfeiture

45. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁴⁹ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹⁵⁰ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.¹⁵¹ We conclude under this standard that Syntax-Brilliant has apparently willfully¹⁵² violated Section 1.17(a)(2) of the Rules by providing incorrect or misleading material factual information to Commission staff without a reasonable basis for believing the information was correct and not misleading during the course of staff's investigation of Syntax-Brilliant's violations of the DTV tuner requirement.

46. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules, the base forfeiture amount for misrepresentation or lack of candor is the statutory maximum,¹⁵³ or, in this case, \$11,000.¹⁵⁴ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(E) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁵⁵ Considering all of the enumerated factors and the particular circumstances of this case, we find that the maximum permitted forfeiture of \$11,000 is warranted here for Syntax-Brilliant's apparent willful violation of Section 1.17(a)(2). The Commission has stated that "[we rely] heavily on the truthfulness and accuracy of the information provided to us. If information submitted to us is incorrect, we cannot properly carry out our statutory responsibilities."¹⁵⁶ Syntax-Brilliant's failure to exercise due diligence to ensure that the information provided in its LOI Response was correct and not misleading

¹⁴⁹ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

¹⁵⁰ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁵¹ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

¹⁵² Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California*").

¹⁵³ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17113; 47 C.F.R. § 1.80(b)(4), Note to Paragraph (b)(4): *Section I. Base Amounts for Section 503 Forfeitures*.

¹⁵⁴ See 47 U.S.C. § 503(b)(2)(D) (setting forth the statutory maximum forfeiture for entities other than broadcasters and common carriers). See also *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum forfeiture amounts for entities other than broadcasters and common carriers to \$11,000/\$97,500). See also *Citicasters*, 22 FCC Rcd at 19339 ¶ 43 (using the base forfeiture amount for misrepresentation/lack of candor as the base forfeiture for violation of Section 1.17 of the rules).

¹⁵⁵ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

¹⁵⁶ *In the Matter of Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Notice of Proposed Rulemaking, 17 FCC Rcd, 3296, 3297 ¶ 3 (2002).

hampered our ability to properly carry out our statutory responsibilities and consumed scarce Commission resources. Accordingly, we conclude that Syntax-Brilliant is apparently liable for an \$11,000 forfeiture.

V. CONCLUSION

47. We have examined Syntax-Brilliant's NAL Response pursuant to the statutory factors prescribed by Section 503(b)(2)(E) of the Act and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Syntax-Brilliant willfully and repeatedly violated Sections 15.117(i)(1)(i) and (ii) of the Commission's Rules, by importing into the United States and shipping interstate DTV receivers that do not comply with the DTV tuner requirement. We also find that Syntax-Brilliant is not entitled to any reduction of the forfeiture amount proposed in the *NAL*, except as discussed above with respect to those units found to have been shipped intrastate rather than interstate and those units imported into the United States. Further, we find Syntax-Brilliant apparently liable for willful violation of Section 1.17(a)(2) for providing incorrect or misleading material factual information without a reasonable basis for believing the information was correct and not misleading. We propose a forfeiture of \$11,000 for this violation.

VI. ORDERING CLAUSES

48. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,¹⁵⁷ and Section 1.80 of the Rules,¹⁵⁸ Syntax-Brilliant Corporation, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of one million, two hundred sixty six thousand, one hundred dollars (\$1,266,100) for willfully and repeatedly violating Sections 15.117(i)(1)(i) and (ii) of the Rules.

49. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁵⁹ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. A request for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, SW, Room 1-A625, Washington, D.C. 20554.¹⁶⁰

50. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, Syntax-Brilliant Corporation, **IS** hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eleven thousand dollars (\$11,000) for its apparent willful violation of Section 1.17(a)(2) of the Rules.

51. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Further Notice of Apparent Liability for Forfeiture, Syntax-Brilliant Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

¹⁵⁷ 47 U.S.C. § 503(b).

¹⁵⁸ 47 C.F.R. § 1.80.

¹⁵⁹ 47 U.S.C. § 504(a).

¹⁶⁰ See 47 C.F.R. § 1.1914.

52. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

53. The response to the forfeiture proposed for Syntax-Brilliant’s apparent violation of Section 1.17(a)(2) of the Rules, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

54. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.¹⁶¹

55. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Mr. Vincent F. Sollitto, Chairman and CEO, Syntax-Brilliant Corporation, 1600 N. Desert Drive, Tempe, AZ, 85281 and Andrew M. Beato, Esq., Stein, Mitchell & Mezines, L.L.P., 1100 Connecticut Avenue, N.W., Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶¹ *Id.*